IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY **NO M 17 OF 2015**

BETWEEN: **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**
Appellant

AND: **WZAPN**
First Respondent

GRAHAM BARTER IN HIS CAPACITY AS INDEPENDENT MERITS REVIEWER
Second Respondent

APPELLANT'S SUBMISSIONS

Part I PUBLICATION

1. This document is in a form suitable for publication on the Internet.

Part II ISSUES

2. The central issue in this appeal is whether, for the purposes of s 91R of the *Migration Act 1958* (Cth) (the **Act**), the detention of a person for a reason mentioned in the Convention[1] necessarily constitutes 'serious harm', irrespective of the frequency, length or conditions of that detention.

3. A subsidiary issue is whether the second respondent (the **IMR**) denied the first respondent (**WZAPN**) procedural fairness in finding that any detention that may occur following his return to Iran would not constitute persecution because it would not occur 'for the essential and significant reason of a Convention ground'.

Part III SECTION 78B NOTICES

4. The Appellant has considered whether notices should be given under s 78B of the *Judiciary Act 1903* (Cth), and concluded that no such notices are necessary.

---

1 Meaning the *Convention Relating to the Status of Refugees 1951*, as amended by the *Protocol Relating to the Status of Refugees 1967*.

Filed on behalf of the Appellant, Minister for Immigration and Border Protection
Prepared by: Ned Rogers
Australian Government Solicitor
Address for service:
Australian Government Solicitor
Level 21, 200 Queen Street
Melbourne, VIC 3000

Date of this document: 10 March 2015
Contact: Ned Rogers
File ref: 15037488
Telephone: 03 9242 1223
Facsimile: 03 9242 1265
E-mail: ned.rogers@ags.gov.au

Part IV DECISIONS BELOW

5. The judgment at first instance is *WZAPN v Minister for Immigration* [2013] FMCA 6. An appeal to the Federal Court of Australia against that judgment was allowed: *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947.

Part IV FACTUAL BACKGROUND

6. WZAPN is a stateless Faili Kurd who was born in Iran. He is between 26 and 30 years old. He arrived in Australia on 21 July 2010, when he became an 'offshore entry person' under the Act. He applied for a refugee status assessment (**RSA**). One of his claims was that, as an undocumented Faili Kurd, over the course of his life he had been subject to detention at various times owing to his ethnicity and membership of a particular social group.[2] He did not claim to have been physically harmed while detained.

7. On 27 September 2010, an RSA officer concluded that WZAPN was not a refugee.

8. WZAPN sought review of that assessment from the IMR. The IMR (at [64(b)]) summarised WZAPN's relevant claim as follows:

> He has been detained by the Basiji and police from time to time, once for 48 hours but on other occasions for no more than twelve hours. He is usually detained for relatively brief periods of time and he has never been physically assaulted, although he has suffered extreme verbal abuse. (emphasis added)

9. On 10 August 2011, the IMR recommended that WZAPN not be recognised as a person in respect of whom Australia has protection obligations under the Convention. For the purposes of this appeal, the IMR's critical finding (at [81]) was that:

> [T]here is a real chance that the claimant will be questioned periodically, and probably detained for short periods when he fails to produce identification, in the reasonably foreseeable future should he return to Iran. (emphasis added)

10. Notwithstanding that finding, the IMR concluded that 'having regard to the guidance provided by s 91R(2)(a), (b) and/or (c), I do not accept that the frequency or length of detention, or the treatment he will receive whilst in detention will involve serious harm within the meaning of the Act' (IMR at [81]).

11. In the alternative, the IMR found that, even if risk of detention described above did involve a real chance that WZAPN would suffer 'serious harm', such harm would not be 'for the essential and significant reason of a convention ground' (IMR at [82]).

---

[2] *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [11].

12. WZAPN sought judicial review of the IMR's recommendation in the Federal Magistrates Court (as it then was). That application was dismissed. WZAPN appealed from that decision to the Federal Court of Australia (North J), which allowed the appeal on two grounds, being that:

(1) the Federal Magistrate erred in failing to find that the IMR had applied the incorrect test to determine whether the respondent was at risk of serious harm within the meaning of ss 91R(1)(b) and (2)(a) of the Act; and

(2) the IMR failed to accord the respondent procedural fairness in the consideration of whether s 91R(1)(a) of the Act applied to the alternative basis upon which the IMR rejected the claims.

Part VI ARGUMENT

iii. SERIOUS HARM

13. This appeal primarily concerns the significance of a finding that there is a real chance that a person will be detained for whether that person has a well-founded fear of being persecuted. Specifically, it concerns whether it is a jurisdictional error for an IMR to consider the frequency and length of detention, or conditions in detention, in deciding whether a person fears 'serious harm', that being an essential component of a finding that a person has a well-founded fear of persecution for a Convention reason.

14. In finding that the IMR had made a jurisdictional error in this case, North J treated a finding that there was a real chance of detention as necessarily establishing a 'threat to liberty' for the purposes of s 91R(2)(a), and therefore as necessarily involving serious harm.[3] On his Honour's approach, the existence of a real chance of any detention (ranging through such circumstances as confinement for a short period while identity checks are conducted, arrest followed a short time later by bail, to long-term imprisonment) would constitute a 'threat to liberty'.

15. In essence, North J reasoned that:

(1) The words of s 91R(2)(a) (including the absence of an express qualitative element, in contrast to the other sub-paragraphs of s 91R(2)), supported the conclusion that 'serious harm in s 91R(1)(b) is constituted by a threat to life or liberty, without reference to the severity of the consequences to life or liberty' (at [28], [30]); and

---

3 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [27], [32], [33].

(2) While s 91R should be construed in accordance with Australia's obligations under the Convention, applying the Convention any threat to liberty amounted to persecution (at [31]–[38], [41]-[42]).

16. Both those conclusions involved error. In summary, the Minister submits that:

(1) Pursuant to Art 1A(2) of the Convention, the fact that there is a real chance that a person will be detained for a Convention reason does not necessarily mean that the person fears 'serious harm' of a kind capable of constituting persecution. The Convention requires a decision-maker to undertake a qualitative assessment of the nature of any harm that a person claims to fear in deciding whether the harm feared is 'serious harm'.

(2) On its true construction, s 91R(2)(a) likewise requires a decision-maker to undertake a qualitative analysis of the detention feared (including considering its length, purpose and attendant conditions) in deciding whether or not there is a 'threat to liberty'. That is consistent with the ordinary meaning of the words Parliament has used, and with the structure of s 91R as a whole, the purpose of that provision, and the presumption that s 91R be interpreted consistently with the Convention.

(iii) Structure of the argument

17. Section 91R(1) relevantly provides:

> For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:
>
> ...
>
> (b) the persecution involves serious harm to the person ...
>
> (emphasis added)

18. As is apparent from the words emphasised above, the 'premise for the engagement'[4] of s 91R(1) is the existence of 'persecution' within the meaning of Art 1A(2) of the Convention. The operative effect of s 91R(1) is to provide that, even when a well-founded fear of persecution can be established in accordance with Art 1A of the Convention, the Convention nevertheless is taken not to 'apply ... unless' the three conditions specified in s 91R(1) (including that the persecution involves 'serious harm') are satisfied.

---

[4] See *SZWAU v Minister* [2015] HCA Trans 2 ln 714 (29 Jan) (Hayne J, *ex tempore*).

19. Accordingly, as a matter of Australian law it is necessary to consider both (1) Art 1A of the Convention; and (2) the three additional conditions found in s 91R(1). While there is substantial overlap between those requirements, they are nevertheless conceptually distinct, and a claim to refugee status may fail at either point.

20. This appeal ultimately concerns the proper construction of s 91R. In interpreting any statute, this Court has regularly emphasised that the task of statutory construction must 'begin and end with the text'.[5] That does not, however, exclude consideration of statutory context, including legislative history and extrinsic material.

21. In this case, s 91R of the Act uses language that is drawn from the international learning concerning the meaning of Art 1A of the Convention. The Convention has one single autonomous meaning for all State parties.[6] It is, therefore, useful to begin by ascertaining the relevant operation of the Convention because:

    (1) that is necessary in order to elucidate the meaning of the words that Parliament has used in s 91R; and

    (2) the 'serious harm' requirement in s 91R(1)(b) is reached only if Art 1A otherwise applies, meaning that the operation of the Convention provides essential context to any decision based on the 'serious harm' requirement.

(ii) Under the Convention, not all detention constitutes 'serious harm'

22. The word 'persecution' is not defined in the Convention. It is, however, generally accepted by the State parties to the Convention that harm, even if perpetrated for a reason mentioned in Art 1A of the Convention, will not amount to persecution unless it rises above a threshold of severity.[7] In many jurisdictions and academic writings, that threshold is identified as a fear of 'serious harm'.[8]

---

5 See, e.g., *Thiess v Collector of Customs* (2014) 250 CLR 664, 671 [22] (French CJ, Hayne, Kiefel, Gageler and Keane JJ); *Alcan (NT) v Territory Revenue* (2009) 239 CLR 27, 47 [47]; *FCT v Consolidated Media Holdings* (2012) 250 CLR 503, 519 [39].

6 See, e.g., *Regina v Secretary of State for the Home Department; Ex parte Adan* [2001] 2 AC 477, 516 (Lord Steyn); *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489, 495 (Lord Hope of Craighead); *Al-Sirri v Secretary for State for the Home Department* [2012] UKSC 54; [2013] 1 AC 745, 790 [75] (Baroness Hale and Lord Dyson); *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* [2006] HCA 53; (2006) 231 CLR 1, 15 [34].

7 See, e.g., *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, 429–30 (McHugh J); *Chen Shi Hai v Minister for Immigration and Multicultural Affairs* [2000] HCA 19; (2000) 201 CLR 293, 302 [24]–[25]; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, 18–21 [55]–[65] (McHugh J); *Mikhailevitch v INS*, 146 F.3d 384, 389–90 (6th Cir. 1998); *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 653, 655 (Lord Hoffman), 656 (Lord Hope of Craighead); ME Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge University Press, 2009) 104, 107–8, 116–117.

8 See, e.g., *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 653, 655 (Lord Hoffman), 660 (Lord Millet); *HJ (Iran) v Home Secretary* [2011] 1 AC 596, 637 (Lord Rodger of Earlsferry); *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14; (2002) 210

23. In applying the 'serious harm' threshold, it is widely accepted that decision-makers must conduct a qualitative assessment of the harm that a claimant fears as part of the task of determining whether that harm constitutes persecution. In the United Kingdom, for example, in *Islam v Secretary of State for the Home Department*, Hoffman LJ endorsed the idea that 'Persecution = Serious Harm + The Failure of State Protection'.[9] His Lordship then said: [10]

> There was in my view no suggestion that a woman was entitled to refugee status merely because she lived in a society which, for religious or any other reason, discriminated against women. Although such discrimination is contrary not merely to western notions but to the constitution of Pakistan and a number of international human rights instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women, which Pakistan ratified in 1996, it does not in itself found a claim under the Convention. The Convention is about persecution, a well founded fear of serious harm, which is a very different matter. ...

In the same case, Millet LJ said: [11]

> The denial of human rights, however, is not the same as persecution, which involves the infliction of serious harm. The 1951 Convention was concerned to afford refuge to the victims of certain kinds of discriminatory persecution, but it was not directed to prohibit discrimination as such nor to grant refuge to the victims of discrimination. ...

In those passages, the Court clearly denied any necessary correlation between a denial of human rights, and a conclusion that 'serious harm' had been established.

24. The same understanding of 'serious harm' finds expression in the Australian cases. For example, in *Appellant S395/2002*, McHugh and Kirby JJ observed that '[w]hatever form the harm takes, it will constitute persecution only if, by reason of its intensity or duration, the person persecuted cannot reasonably be expected to tolerate it.'[12]

25. In a similar vein, McHugh J explained in *Minister for Immigration and Multicultural Affairs v Respondent S152* that:[13]

CLR 1, 9-10 [19]–[20] (Gleeson CJ). See also JC Hathaway, *The Law of Refugee Status*, (Butterworths, 1991) 105, stating 'A well-founded fear of persecution exists when one reasonably anticipates that remaining in the country may result in a form of serious harm'. Matthew Price notes that the 'American trend has been in the direction taken more definitively by Canadian, British, and Australian courts: persecution means nothing more than serious harm against which the state is unable, or unwilling to provide protection': ME Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge University Press, 2009), 104. In Canada, to be considered persecution, the mistreatment suffered or anticipated must be serious or a fundamental threat to human rights: *Sagharichi v Canada (Minister of Employment and Immigration)* (1993) 182 N.R. 398; *Chan v Canada (Minister of Employment and Immigration)* [1995] 3 S.C.R. 593, 635.

9 [1999] 2 AC 629, 653.

10 [1999] 2 AC 629, 655 (emphasis added). See also *HJ (Iran) v Home Secretary* [2011] 1 AC 596, 622 [15] (Lord Hope of Craighead).

11 [1999] 2 AC 629, 660 (emphasis added).

12 *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71; (2013) 216 CLR 473, 489 [40] (McHugh and Kirby JJ) (emphasis added).

13 [2004] HCA 18; (2004) 222 CLR 1, 26 [73] (citations omitted) (emphasis added).

> It is not to be supposed that the Convention required signatory States to give asylum to persons who were persecuted for a Convention reason but who were unlikely to suffer serious infringement of their rights as human beings. Thus, for the purpose of the Convention, the feared harm will constitute persecution only if it is so oppressive that the individual cannot be expected to tolerate it so that refusal to return to the country of the applicant's nationality is the understandable choice of that person.

26. Applying the above approach, it is clear that a person would not be expected to tolerate a threat (in the sense of a "likelihood of harm"[14]) that a person will be killed. All such threats necessarily involve serious harm, because the harm that is feared does not admit of shades of intensity.

27. But where lesser forms of harm are feared, the position is not so black and white. Harm falling short of death may have different levels of severity. For that reason, it is necessary to undertake a qualitative assessment of the particular harm that is feared, considering for example its 'intensity' or 'duration', in order to determine whether the harm feared is 'so oppressive' that a person cannot be expected to tolerate it.[15]

28. The necessity to engage in a qualitative assessment of the kind contemplated in the above authorities is supported by leading academics in the area of refugee law. Thus, Professor Goodwin-Gill has written that 'persecution is also very much a question of degree and proportion, requiring relation of the general notion to commonly accepted principles of human rights'.[16] And Professors Hathaway and Foster have recently written that assessing whether the harm feared amounts to serious harm always 'requires careful scrutiny of particularized circumstances'.[17]

29. The approach taken by North J cannot be reconciled with the above authorities and academic commentaries, because North J found that the IMR made a jurisdictional error by engaging in a qualitative assessment of the very kind required by those authorities. Contrary to the approach envisaged by those authorities, North J expressly held that, under both the Act and the Convention, any period of detention,

---

14 *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 60; (2006) 233 CLR 1, 4 [1], 5 [3] (Gleeson CJ and Kirby J), 9 [20] (Gummow J); 17 [50] (Callinan and Heydon JJ).

15 That being the approach adopted in, e.g., *VBAS v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 141 FCR 435, [28] (Crennan J); *SCAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 962, [36] (von Doussa J); *SZBOV v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 1407, [19]–[20] (Jacobson J).

16 Guy Goodwin-Gill, 'Entry and Exclusion of Refugees: The Obligations of States and the Protection Function of the Office of the United Nations High Commissioner for Refugees' (1982) 3 *Michigan Yearbook of International Legal Studies* 291, 298.

17 Hathaway and Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 198. North J's reliance on p 239 of this text was misplaced, for the analysis there was concerned with the circumstances in which detention, which was assumed to be of sufficient severity to constitute serious harm, would nevertheless not constitute persecution (i.e. where it is lawful, not arbitrary and without harsh conditions). The learned authors should not be understood to suggest that any detention necessarily involves serious harm unless those conditions are met.

irrespective of its length, conditions or other features, constitutes serious harm.[18] That could be correct only if a real chance of detention, irrespective of its length or character, is invariably more serious than a real chance of being the victim of physical or other forms of harm (which constitute persecution only if they rise to the level of 'serious harm'). Plainly that is not so.

30. The Minister has been unable to locate any authority that supports the absolute and inflexible position adopted by North J. There are, however, many cases that are inconsistent with that approach.

31. In the United States, it has been specifically held that detention of a short duration, which is not accompanied by other forms of harm, does not 'rise to the level' of persecution.[19] In each case, detention on its own was insufficient to cross the relevant threshold. For example in *Vasili v Holder*, the Federal Court (1st Circuit) noted that '[i]nfrequent beatings, threats, or periodic detention ... do not rise to the level of persecution, and the nature and extent of an applicant's injuries are relevant to the ultimate determination.'[20]

32. Similarly, in *Velluppillai v Canada*, the Immigration Review Board (**IRB**) concluded that short periods of detention did not amount to persecution. The Federal Court of Canada held that such a conclusion was 'generally true', although in the specific case before it the IRB had erred by failing to consider the particular circumstances of the applicant.[21]

33. Within the European Union, State responses to the assessment of refugee claims is governed by *European Union Council Directive 2011/95/EU* (**the EU Qualification Directive**).[22] Article 9 of the EU Qualification Directive states:

> 1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, [23] an act must:

---

18 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [18], [30], [44]-[45].

19 See, e.g., *Vasili v Holder*, 732 F.3d. 83, 89–90 (1st Cir. 2013); *Gomez-Zuluaga v Attorney General of US*, 527 F.3d 330, 342–3 (3d Cir. 2008); *Topalli v Gonzales*, 417 F.3d 128, 132 (1st Cir. 2005); *Borca v INS*, 77 F.3d 210, 214 (7th Cir. 1996). See also *El Hof v Canada (Minister of Citizenship and Immigration)* [2005] FC 1515; P Zambelli, *The Refugee Convention: A Compendium of Canadian and American Cases* (Carswell, 1999) 77–93.

20 *Vasili v. Holder*, 732 F.3d. 83, 89 (1st Cir. 2013).

21 *Velluppillai v Canada (Minister of Citizenship and Immigration)*. [2000] F.C.J. No. 301 (QL). See also *Omar v Canada (Minister of Citizenship and Immigration)* 2000 FC 14772, [6], [12].

22 *Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* [2011] OJ L 337/9. The United Kingdom has not adopted this Directive and remains bound by the pervious directive (Directive 2004/83/EC), which is relevantly the same.

(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a). (emphasis added)

Consistently with the language of that EU Qualification Directive, detention would not constitute persecution unless it is 'sufficiently serious' or 'sufficiently severe' to constitute a 'severe violation' of human rights.[24] It necessarily follows that, in evaluating whether a real risk of detention constitutes persecution, a decision-maker must assess the length, frequency and circumstances of the feared detention.[25]

34. Consistently with the above, in the year before the operation of the Convention was extended by the 1967 *Protocol Relating to the Status of Refugees*, Professor Atle Grahl-Madsen wrote:[26]

> We may conclude that there is precedent for considering the following measures or sanctions 'persecution' in the sense of the Refugee Convention, provided that the circumstances warrant it: ... (2) Imprisonment or other forms of detention or internment for a period of three months or more, it remaining an open question whether deprivation of physical freedom for shorter periods may constitute 'persecution'; however deprivation of liberty for 10 days or less has been deemed not to amount to 'persecution'.

That suggests, at the very least, that the Convention was not then understood as operating to require State parties to extend protection to persons who had a well-founded fear of detention for short periods of time.

35. For the above reasons, North J erred in concluding that, under the Convention, detention involves the infliction of serious harm without allowing any room for a qualitative assessment of the circumstances of that detention.[27] International cases and commentaries concerning the Convention demonstrate that a qualitative assessment of that kind is, in fact, an integral part of determining whether any harm that is feared is sufficiently serious to support a well-founded fear of persecution. That conclusion is important to the proper construction of s 91R of the Act.

---

23 The term 'Geneva Convention' in Article 9 of the EU Directive Qualitative Directive is a reference to the Refugees Convention.

24 See, e.g., *Bundesrepublik Deutschland v Vertreter des Bundesinteresses beim Bundesverwaltungsgericht* European Court Reports 2012; [2013] 1 CMLR 5, [59], [65]; *D [a minor] - v- Refugee Appeals Tribunal & Anor* [2011] IEHC 431; [2011] 3 IR 736, [7] (High Court of Ireland).

25 As illustrated, for example, in *LP (LTTE area – Tamils – Colombo – risk?) Sri Lanka CG* [2007] UKAIT 00076, [236].

26 A Grahl-Madsen, *The Status of Refugees in International Law* (A. W Sijthoff, 1966) vol 1, 201 (emphasis added).

27 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [27], [33], [35], [44].

(iii) Section 91R(1)(b) and (2): serious harm and 'threats ... to liberty'

36. Section 91R(2) relevantly provides:

> Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of ***serious harm*** for the purposes of that paragraph:
>
> (a) a threat to the person's life or liberty ...

37. In interpreting that section, the Court should:

(1) have regard to the language and structure of s 91R;

(2) seek to adopt an interpretation of s 91R that is consistent with its purpose;[28]

(3) seek to interpret s 91R consistently with the meaning of the Convention; and

(4) interpret the provision, to the extent possible, to avoid an interpretation that would generate inconvenient or absurd outcomes.[29]

38. All those considerations point against acceptance of North J's interpretation of s 91R(2)(a), which treated a real chance of <u>any</u> period of detention, irrespective of frequency, length or conditions, as necessarily constituting a 'threat to liberty'.

(a) Language and structure

39. Starting with the text of s 91(2)(a), the word 'liberty' is not defined in the Act, nor is it used in the Convention. The Convention does refer, in Articles 31 and 33, to a threat to 'life or freedom', but read in context that phrase is used to encompass the full range of matters that may constitute persecution under the Convention. Thus, as Professor Hathaway has argued, that phrase was used as shorthand for risks giving rise to refugee status under Art 1 of the Convention.[30] The word 'freedom' from the Convention therefore plainly is not synonymous with 'liberty' as that word is used in s 91R(2)(a).[31]

40. As a matter of ordinary language, 'liberty' can convey a wide range of different meanings. The Shorter Oxford Dictionary gives as the first three definitions of 'liberty':

---

28 Section 15AA of the *Acts Interpretation Act 1901* (Cth); *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, 381–382 [69]–[70] (McHugh, Gummow, Kirby and Hayne JJ) (***Project Blue Sky***); *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642, 649–50 [5] (French CJ and Bell JJ).

29 *Minister for Immigration and Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642, 651 [9], 653 [12] (French CJ and Bell J) cf 664 [47], 665 [53], 669 [65] (Crennan and Kiefel JJ); *Tickle Industries Pty Ltd v Hann* (1974) 130 CLR 321, 331 (Barwick CJ, with whom McTiernan J agreed).

30 James C Hathaway, *The rights of refuges under international law* (Cambridge University Press, 2005) 304–305.

31 This appears to be contrary to the view of North J: *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [27], [32], [33].

'[e]xemption or release from captivity, bondage, or slavery'; 'exemption or freedom from arbitrary, despotic, or autocratic rule or control'; and 'the condition of being able to act in any desired way without restraint; power to do as one likes'.[32]

41. There is a constructional choice required in selecting the appropriate meaning of the word 'liberty' as it has been used in the phrase 'threat to liberty' in s 91R(2)(a). At its broadest a 'threat to liberty' could mean any restriction on a person's freedom to move or otherwise do as one likes. But plainly that is not the sense in which the word is used in s 91R(2)(a), for that would entirely negate the 'serious harm' requirement and would be inconsistent with the other paragraphs in s 91R(2).

42. North J focused in his reasons on the interpretation of s 91R(2),[33] and as a consequence gave insufficient weight to the structure of s 91R as a whole. That structure is inconsistent with the meaning his Honour attributed to s 91R(2)(a) because, as was noted above, the 'premise for the engagement' of s 91R(1) is that a person has a well-founded fear of 'persecution' within the meaning of the Convention. Given that, for the reasons addressed above, a well-founded fear of detention for a short period is not (without more) sufficient to give rise to a well-founded fear of persecution under Art 1A of the Convention, Parliament cannot have intended to deem a threat of any period of detention to constitute 'serious harm' for the purposes of s 91R(1)(b). That follows because Parliament could not rationally have intended to set the threshold of harm in s 91R(1)(b) lower than the threshold under the Convention, because in any case where it did that s 91R(1)(b) could never have any operation because the claim to refugee status would fail when assessed against Art 1A in any event. That strongly suggests that s 91R(2)(a) should not be interpreted as setting a lower threshold than arises under the Convention, because if it were to be so interpreted that would attribute to Parliament an intention to enact a provision that would (to that extent) have no work to do.[34]

43. When s 91R(2) is read as a whole, it is apparent that most of its paragraphs contemplate, consistently with the established meaning of the Convention, that an

---

32 *The New Shorter Oxford English Dictionary* (Clarendon Press, 6th ed, 2007) 1591.

33 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [28].

34 Cf *Plaintiff M47 v Director-General of Security* (2012) 251 CLR 1, 77 [173], 83 [194], 87 [206], 91 [221] (Hayne J), 179 [488] (Bell J); *Project Blue Sky* (1998) 194 CLR 355 at 382 [71]; *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ), 419 (O'Connor J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 12–13 (Mason CJ); *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 266 [39], 267 [41]–[42] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), 278 [76], 280 [79] (Heydon J); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32; (2011) 244 CLR 144, 192 [97] (Gummow, Hayne Crennan and Bell JJ).

evaluative judgment must be made. Leaving aside threats to liberty, each other instance of harm specified involves a grave threat to the person's life (identified by the terms 'life' and 'capacity to subsist') or physical wellbeing (identified by the terms 'significant physical harassment' and 'significant physical ill-treatment'). The phrase 'threat to liberty' must be read in that context. While s 91R(2)(a) is not expressly qualified by a word requiring an evaluative judgment, a word of that kind was obviously inappropriate in the context of a threat to life (which does not admit grades of severity), which may go part of the way to explaining the absence of such a word in paragraph (a). Further, such a word was not required with respect to a 'threat to liberty' because the need for an evaluative judgment is inherent within that concept. That follows because, as the ordinary meanings of 'liberty' reveal, that word is often used to refer to freedom from particularly serious forms of restraint (eg bondage, slavery, despotic or autocratic control).

44. In the absence of anything to suggest that Parliament intended to require a real chance of detention to be analysed in a markedly different way to a real chance of any other kind of harm, s 91R(2)(a) should be interpreted to operate consistently with the other paragraphs of s 91R(2), all of which require a qualitative evaluation of the seriousness of the harm feared. As Gummow J observed in *VBAO*, the instances of harm listed in s 91R(2) all 'take their colour from the specification of "serious harm" in the opening words of the sub-section.'[35]

(b) Purpose

45. Section 91R was inserted into the Act by the *Migration Legislation Amendment Act (No 6) 2001* (Cth). It was enacted to 'set the parameters and raise the threshold of what can properly amount to "serious harm", within the spirit of the Refugees Convention.'[36] As Callinan and Heydon JJ put it in *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs*,[37] s 91R is a 'manifestation of statutory intent to define persecution, and therefore serious harm, in strict and perhaps narrower terms than an unqualified reading of any unadapted Art 1A(2) ... might otherwise require'.

46. The Explanatory Memorandum that accompanied the Bill that became that Act indicates that s 91R(1) and (2) were not intended to expand the class of persons

---

35 *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 60; (2006) 233 CLR 1, 9 [19].

36 *Minister for Immigration and Multicultural and Indigenous Affairs v VBAO* (2004) 139 FCR 405, 411 [36] (Marshall J), cited in *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 60; (2006) 233 CLR 1, 14 [40] (Callinan and Heydon JJ).

37 *VBAO v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 60; (2006) 233 CLR 1, 17 [49].

entitled to protection. The Explanatory Memorandum states that s 91R was enacted in order to 'restore the application of the [Convention] ... in Australia to its proper interpretation',[38] that being done because 'over recent years the interpretation of the definition of a "refugee" by various courts and tribunals has expanded the interpretation of the definition so as to require protection to be provided in circumstances that are clearly outside those originally intended'.[39] It also stated that 'The Bill ensures that the Refugees Convention provides appropriate protection to refugees consistent with the international obligations that Australia assumed when becoming party to the Convention'.[40] Thus, having discussed the components of s 91R(2), the Explanatory Memorandum states:[41]

> The above definition of persecution reflects the fundamental intention of the Convention to identify for protection by member states only those people who, for Convention grounds, have a well founded fear of harm which is so serious that they cannot return to their country of nationality ... These changes make it clear that it is insufficient to establish an entitlement for protection under the Refugees Convention that the person would suffer discrimination or disadvantage in their home country, or in comparison to the opportunities or treatment which they could expect in Australia. Persecution must constitute serious harm ...
>
> The Refugees Convention is not intended to justify providing residence status on broader humanitarian grounds. (emphasis added)

47. There is nothing in the Explanatory Memorandum that would lend any support to the view that, by enacting s 91R(2)(a), Parliament intended to deem any detention, irrespective of its circumstances, to constitute 'serious harm'.

(c) Consistency with the Convention

48. In *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH*,[42] this Court stated that:

> Australian courts will endeavour to adopt a construction of the Act ... which conforms to the Convention. And this Court would seek to adopt, if it were available, a construction of the definition in Art 1A of the Convention that conformed with any generally accepted construction in other countries subscribing to the Convention.

49. Consistently with that approach, the Court should strive to adopt an interpretation of the words 'threat to liberty' that is consistent with the approach taken under the Convention to the identification of 'serious harm'. While North J was conscious of the

---

38 Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [1].

39 Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [3]; and see [19], [22].

40 Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [6].

41 Explanatory Memorandum, Migration Legislation Amendment Bill (No 6) 2001 (Cth), [25]-[26].

42 [2006] HCA 53; (2006) 231 CLR 1, 15 [34].

need to interpret s 91R consistently with the Convention,[43] for the reasons already advanced the interpretation that his Honour adopted did not achieve that consistency.

50. Justice North erred as to the requirements of the Convention because he wrongly sought to define the concepts of 'serious harm' and 'persecution' by reference to international human rights treaties that post-date that Convention, and that are directed to a different topic.[44]

51. Treaties such as the *International Covenant on Civil and Political Rights* are concerned with specifying the manner in which parties to those treaties must themselves treat persons within their territory and subject to their jurisdiction. The Convention, by contrast, is concerned with the circumstances in which parties to the Convention are not free to return a non-citizen within their territory to his or her country of origin. In identifying those circumstances, the relevant question is not whether the country of origin will accord to the non-citizen all of the rights that are identified in international human rights instruments.[45] It is the narrower question whether there is a real chance that the non-citizen will be subjected to serious harm for a Convention reason.

52. To conflate those questions is to extend the operation of the Convention so that it embraces conduct of a kind never contemplated by the parties to that Convention. As Gummow J (with whom Gleeson CJ and Hayne J agreed) said in *Minister for Immigration and Multicultural Affairs v Haji Ibrahim*:[46]

> The States which did participate nevertheless had no commitment to basing the Convention in the international promotion of human rights ... The result has been described by Professor Hathaway:[47]
>
> > "The rejection of comprehensive humanitarian or human rights coverage is explained by the conviction of most Western states that their limited resettlement capacity should be reserved for those whose flight was motivated by pro-Western political values ...
> >
> > In sum, the first main feature of modern international refugee law is its rejection of comprehensive humanitarian or human rights based assistance in favor of a more narrowly conceived focus."

---

43 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [31].

44 Cf *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225, 251–6 (McHugh J); *HJ (Iran) v Home Secretary* [2011] 1 AC 596, 622 [15] (Lord Hope of Craighead); *Advisory Opinion on Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa), notwithstanding Security Council resolution 276 (1970)* [1971] *ICJ Reports* 16, 31 [53].

45 *HJ (Iran) v Home Secretary* [2011] 1 AC 596, 622 [15] (Lord Hope of Craighead); A. Zimmerman (ed.), *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (Oxford Commentaries on International Law, 2011), 348. Further, detention is not unlawful under international human rights law unless it is arbitrary (eg. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 9).

46 (2000) 204 CLR 1, 47–8 [139].

47 Hathaway, "A Reconsideration of the Underlying Premise of Refugee Law" (1990) 31 *Harvard International Law Journal* 129, 148–9.

53. In interpreting the Convention, it is important that courts do not give it a meaning contrary to that accepted by the State parties to it.[48] As Lord Bingham said in *European Roma Rights Centre v Immigration Officer, Prague Airport*:[49]

> [T]he court's task remains one of interpreting the written document to which the contracting states have committed themselves. It must interpret what they have agreed. It has no warrant to give effect to what they might, or in an ideal world would, have agreed.

54. In this case, the IMR's factual finding was that 'there is a real chance that the claimant will be questioned periodically, and probably detained for short periods when he fails to produce identification' (IMR at [81]). In the past that detention had often lasted only about 2 hours, and in all but one case it had a duration of less than 12 hours. While such detention undoubtedly constituted an interference with WZAPN's human rights, it did not rise to the level of a threat to his 'liberty', as that word should be understood in s 91R(2)(a).

55. Accordingly, the IMR's finding that WZAPN would 'probably [be] detained for short periods' did not amount to a finding that there was a real chance of serious harm, and therefore was not itself sufficient to support the existence of a well-founded fear of persecution.

(d) Anomalous consequences

56. Finally, if s 91R(2)(a) were interpreted in such a way that any threat of detention necessarily constitutes serious harm, that would produce anomalous results. It would allow protection claims to be established based on a real chance of even a short period of detention, when more serious infringements of rights may nevertheless fail to constitute persecution because they fall short of the 'serious harm' threshold. For example, in a situation where it was virtually certain that persons of a particular ethnic group (but not the population generally) would be detained for 1 to 2 hours on arrival at the airport in a particular country, and that this would not occur pursuant to any law of general application, on North J's approach persons from that group would be refugees, even if they had no basis to fear any other form of harm. That conclusion would follow notwithstanding the fact that a well-founded fear of detention for a matter of hours

---

[48] *Contra* Hathaway and Foster, *The Law of Refugee Status* (Cambridge University Press, 2nd ed, 2014) 194–5, who argue that the application of a human rights framework for identifying serious harm under the Convention allows the meaning of this concept to evolve. North J erred in adopting that approach, for such "evolution" departs from the meaning negotiated by the parties.

[49] [2005] 2 AC 1, 31 [18].

would fall well short of conduct that would engage international obligations under the Convention.

57. If the Court accepts that detention in the circumstances posited above would not involve serious harm, it necessarily follows that there can be no direct equation of a well-founded fear of detention with a 'threat to liberty'. Instead, a qualitative analysis of the kind of detention feared (including it length, purpose and attendant conditions) is required to determine whether such a threat exists. This is consistent with 'a threat to ... liberty' in the Act being a nuanced concept that is not established simply by demonstrating any period of detention or restriction on freedom of movement.

58. On that approach, there will be some circumstances where a real chance (or even certainty) of short-term periodic detention will not be sufficient to amount to serious harm. Whether such detention involves serious harm will have to be evaluated by the decision-maker on the material that is advanced in support of a claim. That is what the IMR did in this case. North J was wrong to find that this involved a jurisdictional error.

B. PROCEDURAL FAIRNESS

59. The IMR held that, even if the detention and questioning that WZAPN feared did amount to serious harm (which it did not accept), it nevertheless was not satisfied that that harm would occur 'for the essential and significant reason of a convention ground' (IMR at [82]). The IMR explained its reason for that conclusion as follows (at [83]-[84]):

> Country information indicates that State and de-facto authorities such as the Basij will stop and question people indiscriminately. Detention will follow if the person stopped is suspected of being involved in any illegal or immoral activity or otherwise presents some threat to State security.
>
> The inability to provide identification papers will attract further enquiries, but I do not consider such questioning and detention as described by the claimant to be persecutory, as I do not consider it to be discriminatory for a Convention reason. Even if people without identification papers could be regarded as a particular social group (which I do not accept), I do not consider such questioning and detention to be inappropriate in the sense discussed by the High Court in *Applicant S v MIMA* (2004) 217 CLR 387. (emphasis added)

60. Justice North correctly recognised that, unless WZAPN could successfully challenge the above reasoning, he would not be entitled to any relief irrespective of the IMR's approach to the 'serious harm' issue.[50] However, his Honour held that the proper interpretation of the above reasoning was that the IMR found that the detention that WZAPN feared would not be for the 'essential and significant reason' of a Convention ground because it would occur in accordance with a law or policy of general

---

50 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [53].

application (at [64]). From that foundation, North J concluded that the IMR had denied WZAPN procedural fairness, because the IMR was:[51]

> bound in fairness to alert the [respondent] to information, if there was any, which demonstrated that the conduct of the Basij was in pursuance of a legitimate national objective, and that the detention was appropriate and adapted to achieving that objective. Alternatively, in the absence of such information, the reviewer was bound in fairness to identify to the [respondent] the issue that the conduct of the Basij may be regarded as conduct appropriate and adapted to achieving a legitimate national objective.

61. The above conclusion involved error because, on the true construction of the IMR's reasons, the IMR concluded that the harm feared was not for the essential and significant reason of a Convention ground because it held that that harm would not occur for a discriminatory reason. That finding did not depend on the existence of a law of general application and, because the IMR did not rely on such a law, procedural fairness did not require the disclosure of information concerning such a law.

62. Persecution cannot occur for a Convention reason if it does not involve discrimination.[52] Discrimination is also necessarily relevant to the criterion in s 91R(1)(a), because a Convention reason cannot be the reason 'for' persecutory conduct unless the persecutors distinguish between persons to whom the Convention reason applies, and those to whom it does not.

63. The IMR expressly referred to the Basij's practice of stopping and questioning people 'indiscriminately'. Then, in the next paragraph, it found that the questioning and detention that would follow the 'indiscriminate' stopping was likewise not 'discriminatory for a Convention reason'. The ordinary and natural meaning of the words used by the IMR is that it was not satisfied that the harm that was feared would occur for an essential or significant reason mentioned in Art 1A(2) of the Convention or s 91R(1)(a). That was sufficient to support the IMR's alternative finding.

64. Justice North focussed on the IMR's reference to *Applicant S v Minister for Immigration and Multicultural Affairs*[53] as indicating that the IMR based its decision on the existence of laws or policies of general application.[54] But *Applicant S* makes it clear that it is necessary to consider whether a law of general application is "appropriate" only if the court concludes that the law is being implemented in a

---

51 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [75].

52 *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* [2000] HCA 55; (2000) 204 CLR 1, 18–19 [55]–[56] (McHugh J); *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, 650–1 (Lord Hoffman). Section 91R(1)(c) expressly recognises this requirement.

53 (2004) 217 CLR 387.

54 *WZAPN v Minister for Immigration and Border Protection* [2014] FCA 947, [64], [65].

discriminatory fashion.[55] Accordingly, the citation of *Applicant S* does not create any reason to doubt that the IMR based its conclusion on the absence of discrimination. The citation is more fairly read as indicating that yet a further ground would have been available for rejecting WZAPN's claim (that being a further ground that was not actually relied upon by the IMR, as the words 'even if ... which I do not accept' reveal).

65. For the above reasons, North J erred in concluding that the IMR denied WZAPN procedural fairness in failing to alert WZAPN to information concerning whether the conduct of the Basij was in pursuance of a legitimate national objective or was appropriate and adapted to achieving that objective, because on a fair reading of the IMR's reasons no reliance was placed on such information.

Part VII APPLICABLE PROVISIONS

66. The applicable legislative provisions are set out in the Annexure.

Part VIII ORDERS SOUGHT

67. The Appellant seeks the following orders from the Court:

    (1) The appeal be allowed.

    (2) The Appellant pay the reasonable costs of the First Respondent of the Appeal.

    (3) The declaration made by the Federal Court on 3 September 2014, and orders 5 and 6 made on the same date, be set aside, and in lieu thereof order that the appeal be dismissed.

Part IX TIME ESTIMATE

68. The Appellant estimates that it will require approximately 1.5 hours for the presentation of its oral argument.

DATED: 10 March 2015

Stephen Donaghue
Telephone: (03) 9225 7919
Email: s.donaghue@vicbar.com.au

Liam Brown
Telephone (03) 9225 7503
Email: liam.brown@vicbar.com.au

[55] *Applicant S v Minister for Immigration and Multicultural Affairs* (2004) 217 CLR 387, 402 [42]-[43].

ANNEXURE

Section 91R of the Act (as at 5 September 2010) was in the following form:

Persecution

(1) For the purposes of the application of this Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:

(a) that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and

(b) the persecution involves serious harm to the person; and

(c) the persecution involves systematic and discriminatory conduct.

(2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph:

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill-treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

(3) For the purposes of the application of this Act and the regulations to a particular person:

(a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

(b) the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.